

# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

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UNITED STATES OF AMERICA, PETITIONER,	} No. —.
v.	
EDWARDS H. CHILDS, TRUSTEE IN BANK- ruptcy of J. Menist Company (Inc.).	

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General of the United States of America prays for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Second Circuit entered April 16, 1923, which decision and judgment affirmed the order in bankruptcy of the District Court of the Southern District of New York disallowing interest at the rate of 12 per cent a year on a claim of the United States for taxes and allowing interest at the rate of only 6 per cent a year.

### STATEMENT OF THE CASE.

On September 30, 1919, the United States assessed against the corporate income of J. Menist Company, Incorporated, an additional tax of \$2,421.75 for the

taxable year 1917, and demanded that the same be paid on or before December 11, 1919. No payment was made, and the corporation was adjudged bankrupt on April 6, 1920.

On May 5, 1921, the United States, through the Collector of Internal Revenue for the Second Collection District of New York, filed a claim in the bankruptcy court for the said tax plus 5 per cent penalty and 1 per cent per month interest until paid. Under the provisions of Section 57 (j) of the Bankruptcy Act the United States withdrew its claim for the penalty of 5 per cent, but insisted that interest at the rate of 1 per cent per month from ten days after due notice and demand for the payment of the tax should be allowed.

The District Court held that interest at the rate of 1 per cent per month was a penalty, and therefore declined to allow interest at the rate of 1 per cent per month, but did allow the claim for the tax with interest at the rate of 6 per cent per year. Affirmance of this order by the Circuit Court of Appeals is the occasion of the present petition.

That the tax was duly levied and is correct in amount are matters not in controversy.

#### QUESTION INVOLVED.

*Is interest at the rate of 1 per cent per month, as provided by the Federal Internal Revenue laws, collectible after due notice and demand from the estate of a bankrupt?*

### STATUTES INVOLVED.

The Act of October 3, 1917 (40 Stat. 300, Sec. 212), making Sec. 14 (a) of the Act of September 8, 1916 (39 Stat. 756), applicable to taxes under the Act of 1917, provides that:

\* \* \* to any sum or sums due and unpaid after the fifteenth day of June of any year, or after one hundred and five days from the date from which the return of income is required to be made by the taxpayer, and after ten days notice and demand thereof by the Collector, there shall be added the sum of five per centum on the amount of tax unpaid *and interest at the rate of one per centum per month upon said tax from the time the same becomes due.*

Section 57 (j) of the Bankruptcy Laws of the United States provides that:

Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby *and such interest as may have accrued thereon according to law.* (Italics ours.)

### REASONS FOR GRANTING THE PETITION.

1. The Circuit Court of Appeals erred in holding that interest at the rate of 1 per cent a month provided by the Federal Internal Revenue laws is a

penalty, and in disallowing the claim of the United States for interest at the rate of 1 per cent a month.

2. The opinion of the Circuit Court of Appeals for the Second Circuit is in conflict with the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of *United States v. Guest*, 143 Fed. 456 and 458, and the opinions in the cases of *In re Kallak*, 147 Fed. 276 (D. C. D. No. Dak.); *In re Scheidt Brothers*, 177 Fed. 559 (D. C. S. D. Ohio).

3. The question of the rate of interest to be allowed the Government for taxes due from the estates of bankrupts is of great public importance in that many thousands of such cases are pending in the Federal Courts throughout the United States; in many such cases interest at the rate of 1 per cent per month has been allowed, and in others interest at different and varying rates has been allowed.

4. The conflict between the decision of the Circuit Court of Appeals for the Second Circuit and the decisions in the other Circuits results in a confusion which makes it necessary that the question involved should finally be determined by this Court in order to establish uniformity in the administration of the Bankruptcy Law throughout the United States.

#### BRIEF IN SUPPORT OF PETITION.

The decision of the Circuit Court of Appeals for the Second Circuit results in a lack of uniform application and administration of the bankruptcy laws. Congress has provided and established a uniform rate of interest on Federal taxes applicable to all tax-

payers for delinquency after due notice and demand. Congress has seen fit to establish that rate at 1 per cent per month. The decision of the Circuit Court of Appeals for the Second Circuit fixes a rate of 6 per cent as collectible from the estate of bankrupts and holds that interest beyond that rate is a penalty. While the rate of interest fixed by Congress is of uniform application throughout the United States, the decision of the Circuit Court necessarily establishes a shifting rate of interest depending upon the legal rate in force in the particular state. In New York it is 6 per cent, while in the Middle West the usual statutory rate is 8 per cent and on the Pacific Coast 10 per cent. Under the rule laid down by the Circuit Court there is no uniformity in the interest rate to be paid by the estates of bankrupts, whereas under the Federal Act uniformity in all cases is attained.

The correctness of the assessment of the tax in this case is not in question. The question is whether interest at the rate of 1 per cent a month, provided by the taxing statutes, is a penalty, and not allowable as such under Section 57 (j) of the Bankruptcy Act.

Interest is recoverable under Section 3184, R. S., providing for the collection of delinquent internal-revenue taxes with interest at the rate of 1 per cent per month and is not a penalty but recoverable as interest. *United States v. Guest* (C. C. A. 4th Cir.), 143 Fed. 456, 458.

In the case of *In re Scheidt Brothers* (D. C. S. D. Ohio), 177 Fed. 559, the court held that a penalty takes the place of interest and allowed 15 per cent

penalty under the Ohio State statutes. The statute involved in the *Scheidt case* provides for a 10 per cent penalty on delinquent taxes, and if it becomes necessary to collect the tax by distraint or court proceedings a further penalty of 5 per cent. *Bridge Company v. Mayer*, 31 Ohio State, 317, 328. In the *Scheidt case* the court said that the allowance of a penalty is intended to cover and is treated as interest and collectible as a part of the tax.

In the case of *Ashland Emery & Corundum Company*, 229 Fed. 829, the court held that interest on taxes not paid when due becomes a part of the taxes and entitled to priority of payment under the Bankruptcy Act. The court allowed interest only at the rate of 6 per cent per annum, however, holding that 1 per cent per month was not interest but a penalty.

In the case of *New Jersey v. Anderson*, 203 U. S. 483, this court stated that it is the province of the courts to enforce, not to make, laws; and if a law works inequitably the redress, if any, must be had from Congress, and arguments directed not to the construction of the Act, but as to the justice of a method of distribution of assets under the bankruptcy law, and the hardship resulting therefrom, can not influence judicial determination.

The question involved in this case is of great public importance. If the rate of interest on bankruptcy claims is limited to 6 per cent per annum, as held by the Circuit Court of Appeals for the Second Circuit in this case, the United States will be deprived of its apparent right to collect interest at the rate of 1

per cent per month and may be compelled to refund ✓  
large sums of money already collected as interest  
at the higher rate prescribed by Congress in the taxing  
act.

It is submitted that in the case of claims for  
Federal taxes filed with a bankruptcy court the rate  
of "such interest as may have accrued thereon accord-  
ing to law," within the meaning of Section 57 (j)  
of the Bankruptcy Act, is 1 per cent a month.

A number of cases involving this same question are  
pending in the District Courts of the United States  
and are being held in abeyance pending the final  
determination of this case. A decision of the question  
involved in this case is necessary to the establish-  
ment of a uniform system of administering the  
bankruptcy laws and the collection of taxes from the  
estates of bankrupts.

Wherefore, it is respectfully submitted that this  
petition for a writ of certiorari to review the decree  
of the Circuit Court of Appeals for the Second Circuit  
be granted.

JAMES M. BECK,  
*Solicitor General.*

JUNE, 1923.

